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**VIRGINIA AND NOVA SCOTIA: AN HISTORICAL NOTE.\***

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Within a few months will occur the bicentenary of the establishment of the first court of judicature, administering the English common law, within what is now the Dominion of Canada, for at Annapolis Royal, in Nova Scotia, on the 20th day of April, 1721 (O. T.), His Excellency, Governor Phillips, and his council, after full advisement, adopted a resolution constituting themselves a court which was to administer justice "by the same manner and proceedings as the general court" in Virginia. It is a far cry from Nova Scotia to Virginia—and more so in the early years of the eighteenth century than now, but nevertheless for several decades of that century the "the lawes of Virginia" were the model and pattern for the new court in Nova Scotia.

The event is in itself one of great historical interest. Of even more interest is the spot where the infant court was established, for probably no other town in North America was so long and so often the prize for which the forces of two great nations contended.

The little town of Annapolis Royal, known as Port Royal in the days of French occupation, is situate at the upper or north-eastern end of Annapolis Basin, a beautiful sheet of water some eighteen miles in length and three or four miles wide. When the brave De Monts with his little flotilla entered the basin in 1604 to put into effect his great scheme to colonize Acadie, by which name Nova Scotia, New Brunswick and the greater part of the State of Maine were for a long time known, the picture that unfolded itself before his gaze is thus described by Judge Thomas Chandler Haliburton (author of *Sam Slick, the Clock-maker*):

"On the Eastern side of the Bay they discovered a narrow Straight into which they entered and soon found themselves in a spacious Basin, surrounded with hills from which descended streams of fresh water. To one of these they gave the name of Lequille. It was bordered with beautiful meadows, and filled with delicate fish. Pontrincourt was

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\*By Hon. Mr. Justice Chisholm, of the Supreme Court of Nova Scotia.

as charmed with the beauty and safety of the harbour, the extent and fertility of the prairies that he chose it for his residence, and having received a grant of it from de Monts, he called it Port Royal”.

In the following year a permanent settlement was begun, “the first durable settlement by the French in North America”, says Ferland, the historian, “and the most ancient town in this part of the world after St. Augustine”.

It is not the particular purpose of this article to deal with the early history of this plantation with any minute detail. It had an historian at the beginning in the person of Marc Les-carbot, a French lawyer who came out in 1606, and in his lively narrative can be found the story of the brave struggles of the young colony. Although the town differs little from many other provincial towns in outward appearance, it far surpasses in historical interest any other town in this part of the continent. No other town or settlement has experienced such vicissitudes: now it was French possession; again it was an English possession; it passed from one great power to the other, reflecting in each change the reactions of the great struggle for dominion of the then two principal nations of the Old World. A short chronological list of the attacks and sieges sustained by the fort and town may be of interest.

1613. The fort opposite Goat Island was raided and destroyed by Samuel Argall (or Argal) who came from the banks of the James River in Virginia. He destroyed all monuments of French power. The parent states were then at peace. In a short time the French settlers returned.

1628. Port Royal was again captured by the English under Kirk, in the name of Sir William Alexander, to whom all Nova Scotia was granted in 1621 by King James I. By the treaty of Saint Germain-en-Laye, Port Royal was restored in 1632 by Charles I to the French King Louis XIII.

1654. On the order of Oliver Cromwell the fort and town were captured by Major Robert Sedgwick of Charlestown. By the treaty of Breda in 1667, Acadie was given back to the French by Charles II.

1680. Port Royal was again taken possession of by the English, then abandoned and re-occupied by the French.

1690. In May of this year Sir William Phips captured Port Royal, but leaving no one to hold the fort the French returned.

1690. In September the fort was attacked, pillaged and burned by commissioned private vessels spoken of as "pirates and corsairs". By the treaty of Ryswick, ratified by William III in 1697, Acadie was again admitted to be French territory.

1704. Port Royal was unsuccessfully attacked by Col. Benjamin Church who set out from Boston to scour the eastern coast.

1707. In May and June Col. March with troops from New England unsuccessfully attacked and besieged Port Royal.

1707. In August and September Col. Hutchinson with troops from New England was repulsed by M. de Subercase, the French Commander.

1710. Port Royal was captured by Col. Francis Nicholson and has ever since remained under the British flag. By the treaty of Utrecht the whole peninsula was formally ceded to Britain. But the troubles of the colony were not yet over, for the Indians and Acadians began attacks.

1711. Annapolis Royal was attacked by Indians and Acadians under M. Gaulin.

1724. There was an attack by a small party of Indians.

1744. There was an attack by Indians under Alexander de Borgue in July.

1744. The fort was attacked and besieged by the French under Du Vivier.

1745. It was attacked and besieged by the French and Indians under Marin.

1746. There was an attack and siege by the French under De Ramesay.

1781. The colony was raided and plundered by American privateers.

When the colony finally became British in 1710, by what laws, it may be asked, was the colony governed? As decided in the notable case of *Uniacke v. Dickson* (1848) 2 Nova Scotia Reports (James) 287, the whole of the English common law

will be recognized as in force in the colony except such parts as are obviously inconsistent with the circumstances of the country; while on the other hand, none of the statute law will be recognized except such parts as are obviously applicable and necessary.

From 1710 to 1721, the colony was under military law, and much dissatisfaction was felt with the system. In 1716 a Mr. Manby was judge advocate, but it appears that he received no pay as no money was available for the purpose. In 1717 Governor Phillips was appointed, and in 1719 he received instructions from the home authorities to choose a council for the management of the civil affairs of the province and until an assembly could be formed "to regulate himself by the instructions of the Governor of Virginia".

In April 1721 a court was established; and the manner in which this was accomplished is thus set forth in the official record (3 Nova Scotia Archives, pp. 28 and 29):

"At a Council held at his Excellency's house in his Majesty's Garrison of Annapolis Royall upon Wednesday, the 19th April, 1721.

PRESENT:

His Excellency, Richard Phillips Esq., Governor; The Honb'le John Doucet Esq., L. Governor; Major Paul Mascarene; Mr. Secretary Savage; John Adams, Hibt Newton, Wm. Skene, Esqes.

"His Excellency acquainted the Board that he had called them together to consider of establishing a Court of Judicature to be held for this Province; that one Article of his Instructions is to make the lawes of Virginia a rule or pattern for this Government where they can be applicable to the present circumstances. That by the lawes of Virginia the Governor and Council were the Supreme Court of Judicature; called by the name of the General Court, which was fully advised on.

"Voted: That it would be for his Majesty's service, as well as very much for the satisfaction of the inhabitants of this Province (under the present circumstances of affairs). That such a Court be held by the Governor and Council as often as it shall be thought necessary.

“Order’d: That some minutes relating to such Court be drawne up by the Secretary in order to be lay’d before the Board at Ten a Clock tomorrow to which time the Board is adjourn’d.

“On Thursday 20th of April, 1721: Mett at the same time and place according to adjournment. The same persons present and Wm. Shirreff, Esqe.

“The Secretary acořding to yesterday Order of Council, deliver’d in some minutes, for his Excellency and Council’s approbation—which were read and approued of and is as follows:

“Whereas under the present difficult circumstances of Affaires of this Province, no regular Court of Judicature according to law, can be as yet held here for said Province but by his Majesty, Governor in Council, and the dayly cry here is for Justice by many of the inhabitants and resident of this Province, by Memorials, Petition, and Complaints to his Excellency the Governor, who at this time being loaded with more than common weight of Government, has not time and leisure to consider fully of the same without the assistance of Council, and being directed by his instructions to make the lawes of Virginia the rule and pattern for this Government (where they are applicable to the present circumstances) untill such time as the Government shall be settled upon a sure foundation according to the Lawes of Great Britain, etc.,:—

“Which matters haueing been fully advised, debated and considered on, Agreed and Order’d: That for the reasons aforesd His Excellency the Governor and Members of his Majesty’s Council for this Province hold and keep a Court of Judicature for said Province annually at the respective times and place here mentioned, vizt: at Annapolis Royal upon the first Tuesday in May, August, November and February yearly and in every year from time to time. Which Court to have the same Style and Cognizance of all matters and pleas brought before them and power to giue Judgment and award. Execution thereupon by the same manner and proceedings as the General Court so called of Governor and Council has in Virginia, and practices at this time. Voted that his Excellency be desired to put out a proclamation relateing to the time where the aforesd Court be held and the manner of the Court, and that as soon as may be’

His Excellency Governor Phillips reported his action to the Secretary of State on May 8, 1721 :

“In order to establish civil government, the Governor and Council have resolved themselves into a Court to meet four times a year. The notion that martial law prevails here hinders settlers from coming into the country”.

The question “Why the lawes of Virginia?” has been ably discussed by Dr. J. M. Clark, K. C., of Toronto, and Mr. T. W. Shelton, of Norfolk, Va. Just a hundred years previously—in 1621—a charter was granted to the London Company whereby a legislative body after the fashion of Parliament was provided for. The Council sat as a Supreme Court. In 1624 the King took the place and exercised the authority of the London Company; and by the time that Governor Phillips received his instructions, the laws of Virginia had been revised and consolidated, I think, five times. By the Virginia Act of 1662, c. 19, the general court of Governor and Council was to sit three times a year, and the same Act established county courts; while Chapter 37 of 1662 provided for the empanelling of juries. Virginia therefore provided in 1717 a good working system which has been tested.

It was modelled after the system administered at home, with modifications suitable to the conditions of a trans-Atlantic colony, and one can well understand why the laws of Virginia should be made the “rule and pattern” for the government of Nova Scotia.

In 1731 and 1732, there was some contention between one, Jennings, and Mr. William Winniet, who was a member of the council, respecting the right to a lot of land in the town. On the 25th day of July 1732, Mr. Jennings' petition was delivered to Mr. Winniet to make answer to them by the 1st of August. On the last mentioned date Mr. Winniet presented his answer and withdrew from his place at the Board. Witnesses were then called, and the trial proceeded in due form, and it was determined that “The Board . . . unanimously agreed that as Mr. Jennings's Right is much preferable to any Claim or Pretensions Advanced to the Board by Mr. Winniet That his the

said Mr. Jennings's Right and Title to the said house and Gardens are Valid and Good".

Mr. Winniet made trouble by complaining that he had received injustice at the hands of the Board, and that he would appeal to His Majesty's Privy Council. At the meeting of the Council held on July 7, 1733, the Lieut. Governor said he had perused his instructions and had found that by the 74th Article of the Virginia Instructions it was expressly ordered that no appeal be admitted unless the sum exceed £300 sterling and that security be given as provided by said Article, "Referring to the Instructions of Virginia".

Upon the founding of Halifax in 1749, by Governor Cornwallis, the seat of government was changed from Annapolis Royal to Halifax. Cornwallis was instructed to establish courts of justice, and in December of that year he appointed a committee to inquire into and report upon the matter. The following is an extract from their report:

"The Committee are of opinion that the form of government in Virginia, being the nearest to that of Nova Scotia, the regulations there established for the General Court and their County Courts will be the most proper to be observed in the Province. The Committee have therefore collected from the laws of Virginia the following regulations with regard to the General Court and the County Courts and the forms to be observed therein".

Then follows a detailed code of procedure, which concludes with the following paragraph:

"That if any difficulty should arise in explaining any of the above rules and regulations that Recourse be had for explanation to the laws of Virginia, whence most of them are derived, particularly an Act entitled An act for establishing the General Court, pp. 251 to 260, and an Act entitled An Act establishing County Courts p. 332 to 338".

In reporting to the Lords of Trade and Plantations on March 19, 1750, Governor Cornwallis said:

"The first thing I set about after the departure of the Charleston was to establish Courts of Judicature and the forms



of proceeding in them. Your Lordships will find that we have nearly followed the Courts of Virginia, etc.,”.

In 1754, Jonathan Belcher, a son of Governor Belcher of Massachusetts, was appointed Chief Justice of Nova Scotia, and the history of our courts thereafter will be found in a series of interesting articles contributed to the Canadian Law Times of Toronto by Hon. Sir Charles Townshend, some time Chief Justice of Nova Scotia. Enough has been shown to demonstrate that “the lawes of Virginia” played an important part in the legal history of Nova Scotia from about 1719 until an assembly was called in 1758, from which date we had the means of enacting our own laws.